

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA**

Case No.: 12-01070-jw

**ORDER GRANTING GERMAN AMERICAN CAPITAL CORPORATION RELIEF  
FROM THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362(d)**

The relief set forth on the following pages, for a total of 10 pages including this page is hereby **ORDERED**.

**FILED BY THE COURT  
05/11/2012**



Entered: 05/11/2012

A handwritten signature in cursive script, reading "John E. Waites". The signature is written in dark ink and is positioned above a horizontal line.

Chief US Bankruptcy Judge  
District of South Carolina

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA**

In re:

Bull Point, LLC,

Debtor.

Case No. 12-01070-jw

Chapter 11

**ORDER GRANTING GERMAN AMERICAN CAPITAL CORPORATION RELIEF  
FROM THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362(d)**

This matter comes before the Court upon the motion (the “Motion”) filed on March 13, 2012 by German American Capital Corporation (“GACC”), as the assignee of the secured rights formerly held by Branch Banking and Trust Company (“BB&T”), seeking relief from the automatic stay pursuant to 11 U.S.C. §§ 362(d)(1), (2) and (3),<sup>1</sup> to allow GACC to complete the foreclosure of its mortgage lien and security interests on the real and personal property securing its claim against Bull Point, LLC (the “Debtor”), which property is comprised of thirty-two lots plus additional acreage (the real property and any improvements on it, collectively, the “Property”) located in Bull Point Plantation in Beaufort County, South Carolina.<sup>2</sup> The Debtor filed an objection to the Motion on March 27, 2012. The Court conducted a hearing on the Motion on April 17, 2012.

At the hearing, GACC submitted a certified copy of the Second Amended Order Granting Summary Judgment (the “Foreclosure Order”) entered by the United States District Court for the District of South Carolina (the “District Court”) on January 23, 2012 in GACC’s foreclosure action against the Debtor, and cited information in the Debtor’s filed schedules and statement of

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<sup>1</sup> Further citations to sections of the United States Bankruptcy Code (11 U.S.C. § 101, *et seq.*) shall be by the cited section number only.

<sup>2</sup> In the Motion and the certification of facts filed by GACC on March 13, 2012 [Docket No. 9], GACC described the Property as consisting of thirty-one lots. On March 20, 2012, GACC filed an amendment of the Motion and the certification of facts [Docket No. 10] to correct the description of the Property to thirty-two lots and additional acreage.

financial affairs in this case, in support of GACC's requested relief under § 362(d). The Debtor presented the testimony of Donald W. Barrett, a Managing Member of the Debtor, and the testimony of William (Billy) Gavigan of Gavigan Homes, Inc., a developer interested in purchasing lots owned by the Debtor, in support of its case.

Based upon the filings of the parties in this matter, the Foreclosure Order, the Debtor's filed schedules and statement of financial affairs, the testimony of the witnesses, and the arguments and statements of counsel at the hearing, the Court makes the following findings of fact and conclusions of law:<sup>3</sup>

### **FINDINGS OF FACT**

1. The Debtor filed its petition for relief under Chapter 11 of the Bankruptcy Code on February 21, 2012 (the "Petition Date").

2. The Motion seeks relief with respect to a loan (the "Loan") originally made by BB&T to the Debtor, which loan BB&T subsequently assigned to GACC.

3. Pursuant to the Loan, on or about December 27, 2007, the Debtor, for consideration, made, executed and delivered to BB&T that certain Promissory Note (the "Note") in favor of BB&T in the original principal amount of \$7,200,000.00, together with interest at the rate stated in the Note.

4. As security for the Note, the Debtor granted to BB&T a mortgage (the "Mortgage") on the Property dated December 27, 2007, which was recorded on January 8, 2008 in the Office of the Register of Deeds for Beaufort County, South Carolina in Book 2668 at Page 2007. In addition, the Loan is further evidenced and secured by a loan agreement, security agreements, guaranty agreements and other documents (collectively with the Note and Mortgage,

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<sup>3</sup> To the extent that any of the findings of fact constitute conclusions of law, they are adopted as such, and to the extent that any of the conclusions of law constitute findings of fact, they are so adopted.

the “Loan Documents”).

5. On March 29, 2011, BB&T assigned all of its rights, title and interest in, to and under the Loan and the Loan Documents to GACC.

6. At the time of the Debtor’s bankruptcy filing, the Property was the subject of a foreclosure action in the District Court, Case No. 9:11-cv-00629-SB (the “Foreclosure Action”), originally filed by BB&T on March 16, 2011, in which GACC was subsequently substituted for BB&T as the plaintiff.

7. The District Court entered the Foreclosure Order in the Foreclosure Action on January 23, 2012. The Foreclosure Order includes the following findings of fact, conclusions of law and order provisions of the District Court:

- a. The Debtor is in default under the Note and the Mortgage by virtue of its failure to make required payments. The Note fully matured on January 5, 2011, and there have been no payments since that date.
- b. The Mortgage constitutes a first priority lien on the Property, subject only to any outstanding *ad valorem* taxes due on the Property.
- c. As of June 15, 2011, the total indebtedness due under the Note was \$6,426,295.51. Interest accrues on the indebtedness at the rate of 8.25% per annum.
- d. Absent payment prior to sale, GACC is entitled to the foreclosure sale of the Property for payment against the indebtedness due under the Loan Documents.
- e. The Property is to be sold by the United States Marshall or a duly authorized Deputy, upon sale provisions stated in the Foreclosure Decree.

f. Personal or deficiency judgment not having been waived, the foreclosure sale is to remain open for thirty (30) days pursuant to S.C. Code Ann. § 15-39-720 (1976).

8. The foreclosure sale of the Property was conducted on January 23, 2012, and GACC was the only bidder. It credit bid \$5,300,000.00 for the Property.

9. Because GACC sought a deficiency judgment in the Foreclosure Action, the foreclosure sale remained open for thirty days, until February 22, 2012 (the “Final Sale Date”).

10. The Debtor filed its bankruptcy petition the day before the Final Sale Date to stay the completion of the foreclosure sale.

11. The Debtor filed its schedules and statement of financial affairs in this case on March 6, 2012 [Docket No. 6]. In its filed Schedule A, the Debtor lists the current value of the Property as being \$7,326,414.84, and the total of the claims secured by the Property as being \$9,035,713.44.

12. In its schedules, other than the Property, the only assets having value listed by the Debtor are “office furniture and equipment, desks, computers, chairs” with a collective value of \$10,000.00.

13. In its filed Statement of Financial Affairs, the Debtor states that it generated no gross income in 2011 or in 2012 (through the Petition Date); that it had gross income in 2010 of \$28,600.00, resulting in an operating loss of \$508,578.00 for 2010; that it made no payments to creditors during the 90-day period preceding the Petition Date; and that the retainer paid to its bankruptcy attorney was provided by members of the Debtor.

14. The Debtor has not been paying the property taxes on the Property.

15. The Debtor describes its property as consisting of thirty-two (32) developed lots

and 97 acres of undeveloped land for which the Debtor has obtained the approval of Beaufort County on a preliminary subdivision plan to create an additional forty-four (44) developed lots.<sup>4</sup>

16. The Debtor proposes to acquire property to add to its estate by the exercise of certain rights of first refusal (the “Right of First Refusal”) that it asserts as the “declarant” under the recorded declaration of covenants and restrictions for the Bull Point Plantation development. Mr. Barrett explained that the Debtor believes that it can acquire property foreclosed upon by other lenders at a significantly discounted price by exercise of the Right of First Refusal, which will then provide it with the ability to obtain post-petition financing and to sell lots to developers at prices that will fund a Chapter 11 reorganization. The funding for the purchase of property by use of the Right of First Refusal and the post-petition financing for the Debtor is to be provided by investors with whom Mr. Barrett and/or other members of the Debtor have been in discussions.

17. As of the date of the hearing, the Debtor had no contracts with potential investors to fund the purchases to be made by use of the Right of First Refusal, no loan or funding commitments for post-petition financing, and only verbal indications of willingness to invest from several persons Mr. Barrett knows. Mr. Barrett was unaware of any attorneys being engaged for the potential investors, and it appears that no draft documents have been prepared for the proposed investments.

18. Similarly, Mr. Barrett was not able to explain the mechanics of how the exercise of the Right of First Refusal would actually occur. He testified that the Debtor owns the Right of First Refusal, and that the potential investors he mentioned were attracted by the opportunity to acquire property at low prices for resale at better values. He was not able to explain how the

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<sup>4</sup> This description is provided in paragraph 3 of the Debtor’s objection to the Motion. It is consistent with the description provided by Mr. Barrett in his testimony at the hearing.

investors would provide the funding and receive their expected interests in the property or in the Debtor.

19. Mr. Gavigan testified that his company, Gavigan Homes, Inc., is interested in purchasing lots in Bull Point Plantation, and he agreed to a letter of intent with the Debtor for the purchase of lots, which was admitted into evidence at the hearing.<sup>5</sup> However, the letter of intent indicates that the purchase of lots would occur over several years, and would depend upon lot release prices to which GACC has not agreed. The letter of intent is expressly non-binding in nature.

20. As of the date of the hearing, no disclosure statement or plan of reorganization was filed in this case.

### **CONCLUSIONS OF LAW**

GACC asserts that it is entitled to relief under either § 362(d)(1) or § 362(d)(2). It also maintains that this case is a single asset real estate case, as defined in § 101(51B), and that, if the stay were not now lifted, the Debtor would be required to file a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time, or commence monthly interest payments to GACC, pursuant to § 362(d)(3); and that the stay should be modified for relief in accordance with § 362(d)(3) in the event the Debtor were to fail to comply with such requirements. As set forth below, the Court concludes that GACC is entitled to relief under both § 362(d)(1) and § 362(d)(2), and the Court thus need not address the request for relief under § 362(d)(3).

#### **A. Relief Under § 362(d)(1)**

Under § 362(d)(1), a party may be granted relief from the automatic stay for cause,

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<sup>5</sup> The Court notes that the letter of intent from Gavigan Homes, Inc. was printed on letterhead from Spartan Group, which appears to be an entity related to Gavigan Homes, Inc.

including the lack of adequate protection of that party's interest in property. Under the circumstances, cause exists to lift the stay in this case because the Debtor has made no payments to GACC (or to BB&T, as GACC's predecessor in interest) in over one year, there is no equity in the Property, and the Debtor has no income or funding with which to make payments to GACC or to pay expenses of the Property. See In re Neals, 459 B.R. 612, 620 (Bankr. D.S.C. 2011); Equitable Life Assurance Soc'y of the U.S. v. James River Assocs. (In re James River Assocs.), 148 B.R. 790, 797 (E.D. Va. 1992) (holding that a continued failure to make mortgage payments along with a non-existent equity cushion can constitute "cause"); In re Kerns, 111 B.R. 777, 789-90 (S.D. Ind. 1990) (same); and In re Quinlan, 12 B.R. 516, 517 (Bankr. W.D.Wis. 1981) (finding that a debtor's "unexcused failure" to make direct payments to a creditor in accordance with a confirmed Chapter 13 plan constituted cause to grant relief from the stay).

Therefore, based on the Debtor's failure to adequately protect GACC's interest in the Property, the Court finds that cause exists to grant GACC's Motion under § 362(d)(1).

**B. Relief Under § 362(d)(2)**

Relief from the stay is proper under § 362(d)(2) if (a) the debtor lacks equity in the property, and (b) the property is not necessary to an effective reorganization. With regard to the burden of proof, pursuant to § 362(g)(1), the party requesting relief under § 362(d) has the burden of proof on the issue of the debtor's equity in the property. Pursuant to § 362(g)(2), once the movant establishes that there is no equity in the collateral, the burden shifts to the party opposing the requested relief to demonstrate that the collateral is necessary for an effective reorganization. Accordingly, GACC had the burden of proving that the Debtor lacks equity in the Property, while the Debtor had the burden of proving that the Property is necessary to an effective reorganization.



GACC cited the Debtor's filed schedules as an admission by the Debtor that it lacks equity in the Property. In its filed Schedule A, the Debtor lists the current value of the Property as being \$7,326,414.84, and in both its Schedule A and its Schedule D, the Debtors states the total of the liens against the Property as being \$9,035,713.44.<sup>6</sup> By the information in its schedules, the Debtor has admitted that it lacks equity in the Property. Therefore, GACC met its burden under § 362(g)(1).

For its part, the Debtor failed to meet its burden of proof under § 362(g)(2) with regard to the second requirement for relief under § 362(d)(2), that the Property is not necessary to an effective reorganization. The Debtor must show that an effective reorganization is reasonably possible and in prospect. "And while the bankruptcy courts demand less detailed showings during the first four months in which the debtor is given the exclusive right [in a Chapter 11 case] to put together a plan, see 11 U.S.C. § 1121(b), (c)(2), even within that period the lack of any realistic prospect of effective reorganization will require § 362(d)(2) relief." United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd. (In re Timbers of Inwood Forest Associates, Ltd.), 484 U.S. 365, 376 (1988). The Debtor failed to show any realistic prospect of an effective reorganization in this case.

No documents or contracts were presented to validate the Debtor's contention that it would be able to obtain immediate financing in order to make adequate protection payments, or to pay other expenses of this case and a reorganization. The Debtor suffered an operating loss of over \$500,000.00 in 2010, it had no income in 2011, and it presently has no income for 2012. It has made no payments to any creditors in over one year. Its proposed course of repurchasing property previously sold in Bull Point Plantation by use the Right of First Refusal lacks

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<sup>6</sup> GACC asserts that it credit bid \$5,300,000.00 for the Property at the foreclosure sale in Foreclosure Action. However, it does not rely on the credit bid amount to establish the lack of equity in the Property, instead citing to the Debtor's filed schedules as an admission of the lack of equity.

important details in how the Right of First Refusal would be exercised and enforced, how the purchases would be funded, what rights investors would acquire, projected expenses to the estate, cash flow projections, and numerous other details necessary to such a venture. The potential investors were not identified, and Mr. Barrett acknowledged that they have not yet committed to the investment. With respect to the letter of intent from Gavigan Homes, Inc. for lot purchases, it must be noted that it is non-binding in nature.

Considering the timing of the Debtor's filing for relief, that the Debtor's statement of financial affairs states that the Debtor received little to no income during the past two years, and that the Debtor's plans appear to be highly speculative, the Court finds that the Debtor has failed to demonstrate that the Property is necessary for an effective reorganization and concludes that relief is proper under § 362(d)(2).

### **CONCLUSION**

For the foregoing reasons, the Court finds that GACC is entitled to relief from the automatic stay under both § 362(d)(1) and § 362(d)(2). Therefore, GACC's Motion is hereby granted, and the stay is lifted to allow GACC to complete its foreclosure action and/or to otherwise enforce its secured rights in the Property.

In light of the grant of relief under §§ 362(d)(1) and (2), the Court need not address whether to grant GACC's request for relief under § 362(d)(3).

**AND IT IS SO ORDERED.**